

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
PETITION FOR
REHEARING
EN BANC**

77-1330

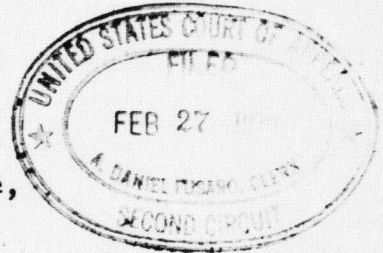
Docket No. 77-1330

B p/s

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

United States of America,

Plaintiff-Appellee,



v.

Alfred Lewis,

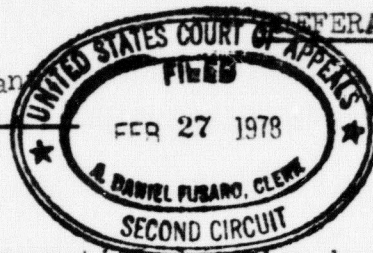
Defendant-Appellant

PRO-SE PETITION FOR REHEARING AND REHEARING EN BANC

Alfred Lewis
#05241
BOX PMB
Atlanta, Ga. 30315

Alfred Lewis,

Defendant-Appellant



77-1320

The appeal in the above-entitled action having been perfected pursuant to and in compliance with the Federal Rules of Appellate Procedure and local rules and orders of this Court dated November 30, 1977, Kaufman, J, November 23, 1977, Meskill, J, and January 3, 1978, Timbers, J, and having actually come on for hearing on February 17, 1978, with the judgement appealed from being affirmed without opinion on that date by Judges Lumbard, Timbers and Gurfein, the appellant herewith requests en banc reconsideration of the appeal for the following reasons-

REASONS FOR EN BANC RECONSIDERATION REQUEST

This Court could not have taken true cognizance of the questions raised in the approved oversized appellant's brief (Nov. 23, 1977, Meskill, J.) because to deny relief on some of the points raised therein requires such a departure or apparent departure from the established case law as to require an accompanying opinion, as demonstrated below.

A. The appellant here was arrested following a stop-and-frisk operation by a police officer who was informed by a previously unknown informant that the appellant, who was riding as a passenger in a taxicab had a gun and had just struck the informant's automobile with another automobile, and nothing more. Following the investigatory stop that resulted, the appellant was searched and a gun was discovered whereupon the appellant was placed under arrest before there was any reason to believe that the gun was unlawfully possessed and without the arresting officer making any attempt to ascertain the legality or illegality of the appellant's possession of the gun. Although there were other factors that, according to the testimony in the case, the informant could have told the officer that would have given him reasonable suspicion for the stop and frisk, and probable cause for the arrest, the informant did not impart these things to the officer. He did not tell the officer that following the auto accident the appellant left the scene instead of stopping or any other thing that would enable the officer to have an

upon the discovery of a gun as if the gun itself was probable cause for arrest when the law held only that an illegal gun is a crime. The cases governing the question are Adams v. Williams, 407 U.S. 143(1972), United States v. Rivera, 501 F.2d 704, 1973, 321 F.2d 704, Wheatley v. Warden, 401 U.S. 560(1971). All of these cases are explicated in detail in Point 1 of the appellant's brief and they hold that prior personal knowledge of facts that warrant reasonable suspicion or probable cause is required by the arresting officer for an investigatory stop and arrest respectively, and that the justification for an arrest must precede the arrest and not follow it, otherwise it is illegal. Thus it is clear that if the instant case is to be denied relief an opinion setting out the reasons therefor must accompany that denial.

B. The question raised in Point 3 of the appellant's brief, whether the inability or failure of a crime witness to give any description of the perpetrator immediately after the crime to law enforcement officers on the scene actively seeking such description should be the primary consideration in determining whether the witness' subsequent identification of a suspect as probably the perpetrator in a one-on one showup was the result of the suggestiveness of that showup, is clearly one that cries out for judicial opinion in view of the Supreme Court holding in Manson v. Brathwaite, ___ U.S. ___ (Jan. 16, 1977) that several factors including the accuracy of the witness' initial description of the perpetrator are to be considered in determining whether in-court reference to a suggestive identification confrontation is to be permitted or banned as tainted. Manson v. Brathwaite, incidentally, is a reversal of this Court's holding in Brathwaite v. Manson, 527 F.2d 363(2 Cir. 1975) that introduction of testimony of a suggestive pre-trial identification confrontation constituted reversible error.

C. The question raised in Point 4 of the appellant's brief, whether the defendant's right to a fair trial was violated when the trial court refused to admit, under the business entry statute and as part of the res gestae, police radio conversation tapes which would have proved a pattern of police lying at the trial among other things when the police testified they heard no description of the robber broadcast over police radio following the robbery although the tapes prove there were broadcast repetitious descriptions of the robber as white male,

argument raised by the government against the police radio tapes' entry cannot prevail, and that the tapes would be admissible under Fed. Rules of Evid. Rule 803(1) as a present sense impression, or Rule 804(b)(5). Additionally, as in Medico at 315, there are in the present case similar factors contributing to the reliability of the tapes' descriptions of the robber as white. (1) Daniel Gonzalez, the bank teller who along with the other bank teller, James Rodriguez, --- who the prosecutor conceded gave the description of white male to the police --- followed the robber for some distance from the bank and thus had a good chance to get clues to his race testified that he was surprised when he discovered at the police station that the robber was not white (T., 79); (2) the time frame of events was very brief---about fifteen minutes from robbery to arrest of the defendant according to police testimony---and the contact of Rodriguez with arriving policemen so closely followed the time when they lost sight of the robber that likelihood of inaccuracy, speculation or fabrication was reduced (T., 68-71). This Circuit's decision in United States v. Mejias, 552 F. 2d 435, 446 (1977) appears to hold that such tapes would be admissible on the credibility issue for rebutting the testimony of the six law enforcement people who gave the impression that no description of the robber's race was broadcast---when the tapes indicated that many descriptions of the robber as white were broadcast---when all six law enforcement people testified substantially that they heard the same things and didn't hear the same things over police radio---that they heard the robbery had occurred and the robber fled in a dark-colored car and a chase was taking place but didn't hear the repetitious descriptions of the robber---which phenomenon is probably astronomically improbable without a coordinated agreement on what to say was broadcast over police radio.

D. The question raised in Point 6 of the appellant's brief regarding the Court's charge on the question of flight is established beyond any question. The trial court in effect charged the jury that "the flight of a defendant from a crime scene, if proved, is a fact which may tend to prove consciousness of guilt. In this case however, there is proof that the defendant was observed fleeing from the bank following the robbery." In this case, the establishment of flight meant

fled from the bank, and it was established and uncontested that only the robber fled from the bank. Thus what the Court said by its flight instruction was that the defendant's guilt was proved. It was the last instruction the Court gave to the jury and thus very damaging. The actual flight charge was as follows:

"There has been evidence that the defendant was observed fleeing from the bank after the robbery was alleged to have occurred. The flight of a defendant immediately after it is discovered that a crime has been committed is a fact, if proved, which may tend to prove the consciousness of guilt on the part of the defendant. Such a fact may be considered by you with all the other evidence and the significance, if any, which you attach to it is a matter for your own determination. The flight of a defendant does not create a presumption of guilt, but it is merely a factor to be considered along with all the other evidence in determining the guilt or innocence of a defendant."(T.,376-377)

There was no witness in the case who testified he or she saw the defendant in the vicinity of the bank or leaving the vicinity of the bank, and no evidence of any kind that bore on flight per se. There were only facts and circumstances advanced by the government as constituting circumstantial evidence that the defendant was the robber. The defendant's counsel objected to the flight instruction given and requested an additional instruction be given to the jury clarifying that it was up to it, the jury to decide whether it was the defendant that fled from the bank but the Court refused stating that its charge was clear on that point.

The appellant does not hereby abandon the other five points contained in the appellant's brief.

Wherefore defendant-appellant respectfully requests that rehearing, preferably en banc be granted.

Dated: Atlanta, Ga.
Feb.22, 1978

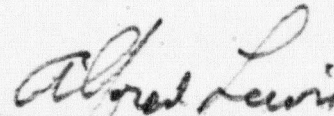

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CERTIFICATION OF SERVICE

I, ALFRED LEWIS, HEREBY CERTIFY THAT TODAY I SERVED A COPY OF THE
ACCOMPANYING PAPERS ON THE APPELLEE BY PLACING SAME IN THE ATLANTA PEN-
ITENTIARY MAILING PLACE IN AN ENVELOPE ADDRESSED TO
UNITED STATES ATTORNEY FOR THE SOUTHERN DISTRICT OF NEW YORK
ONE ST. ANDREWS PLAZA , NEW YORK NEW YORK
10007

DATED: FEB 23, 1978
ATLANTA, GA. 30315



DEFENDANT APPELLANT

